

Nestenberg v Standard Intl. Mgt. LLC

2020 NY Slip Op 31596(U)

May 27, 2020

Supreme Court, New York County

Docket Number: 157227/2015

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

CARL NESTENBORG,

Plaintiff,

- v -

STANDARD INTERNATIONAL MANAGEMENT
LLC, ANDRE BALAZS PROPERTIES, ABG STANDARD
OPERATOR LLC, AB GREEN GANSEVOORT LLC,

Defendant.

-----X

STANDARD INTERNATIONAL MANAGEMENT LLC, ANDRE
BALAZS PROPERTIES, ABG STANDARD OPERATOR LLC,
AB GREEN GANSEVOORT LLC

Plaintiff,

-against-

Defendant.

-----X

INDEX NO. 157227/2015

MOTION DATE 01/24/2020,
01/24/2020

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595006/2016

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 106, 107, 108, 109, 110, 111, 117, 120, 121, 123, 126

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 104, 112, 114, 115, 116, 118, 125, 138

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this personal injury action, third-party defendant/second third-party plaintiff Pavarini McGovern, LLC ("Pavarini") moves, pursuant to CPLR 3211 and/or 3212, for an order dismissing the third-party complaint of defendants/third-party plaintiffs Standard International Management,

LLC, ABG Standard Operator, LLC i/s/h/a Andre Balazs Properties, ABG Standard Operator, LLC, and AB Green Gansevoort, LLC (collectively "the hotel owners"), as well as any and all cross claims and counterclaims asserted against it (Doc. 49). In the alternative, Pavarini seeks an order granting it summary judgment on its second third-party complaint against second third-party defendant J.E.S. Plumbing & Heating Corp. ("JES") for its causes of action based on contractual indemnification and breach of contract for failure to procure insurance (motion sequence 002) (Doc. 49). JES and the hotel owners partially oppose the motion (Docs. 107-110).

JES also moves, pursuant to CPLR 3212, for an order dismissing the second third-party complaint, as well as any and all cross claims asserted against it (Docs. 70-88) (motion sequence 003), and Pavarini opposes the same (Docs. 114-115). After a review of the parties' contentions, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On October 11, 2014, plaintiff Carl H.R. Nestenborg ("Nestenborg" or "plaintiff") was injured by a bathroom sink that fell from the wall in his hotel room (room 515) at the Standard International Hotel ("the Standard Hotel") located at 848 Washington Street, New York, NY (Doc. 1 ¶ 39). On July 16, 2015, Nestenborg commenced this action against the hotel owners by filing a summons and complaint (Doc. 1). In the complaint, plaintiff alleged, *inter alia*, that the hotel owners were negligent in installing and making necessary repairs to the subject sink (Doc. 1 ¶ 41). In January 2016, the hotel owners filed a third-party complaint against Pavarini, the general contractor for the construction of the Standard Hotel, asserting claims for (1) contribution; (2) common-law indemnification; (3) contractual indemnification; and (4) breach of contract (Doc. 15). Pavarini interposed an answer on February 3, 2016, raising several affirmative defenses (Doc.

17). On June 24, 2016, Pavarini commenced a second-third party complaint against JES, the subcontractor allegedly responsible for installing the sink (Doc. 19). Pavarini asserted claims based on (1) contractual indemnification; (2) common law negligence; (3) attorneys' fees; and (4) breach of contract to procure insurance (Doc. 19). JES filed an answer to the second third-party complaint on August 15, 2016, asserting a counterclaim against Pavarini and a cross claim against the hotel owners based on the doctrines of apportionment, contribution, indemnification and breach of contract for the full amount of any verdict or judgment (Doc. 21 ¶¶ 22-23, 24-25).

The note of issue in this matter was filed on July 24, 2019 (Doc. 48).

In September 2019, Pavarini filed the instant motion seeking dismissal of the complaint pursuant to CPLR 3211 and/or 3212 (Doc. 49). Pavarini argues, *inter alia*, that it is entitled to dismissal of the third-party complaint because its proof establishes that plaintiff was injured six years after Pavarini had completed work on the fifth floor of the hotel (Doc. 50 ¶ 43). Moreover, the hotel owners were in exclusive possession and control of the subject hotel room from September 17, 2008 through October 11, 2014 and, during such time, there were no complaints about a loose sink in room 515 (Doc. 50 ¶¶ 33, 38, 43).

Pavarini also maintains that it cannot be held liable for plaintiff's injuries because it did not have the authority to direct, control or supervise JES' work at the premises (Doc. 50 ¶ 45). Moreover, asserts Pavarini, the contribution and common-law indemnification claims are barred by the three-year statute of limitations pursuant to CPLR 214(5) and, pursuant to CPLR 213(2), the claims for contractual indemnification and breach of contract are barred by the six-year statute of limitations (Doc. 50 ¶¶ 47-48). Pavarini also claims that there is no basis for a contractual claim by the hotel owners because, although the construction contract contained a warranty provision for "any damage or defect resulting from the wear and tear, abuse or improper operation that occur[ed]

after [s]ubstantial [c]ompletion," this warranty was limited to one year and had long expired at the time of plaintiff's injuries (Doc. 50 ¶ 49-50). Pavarini further argues that, because the hotel owners failed to preserve the sink for its inspection, dismissal of the third-party complaint is warranted based on spoliation grounds (Doc. 50 ¶ 51-59). Should the Court decline to dismiss the third-party complaint and counterclaim against it, Pavarini argues that, at the very least, it is entitled to summary judgment against JES for contractual indemnification and breach of contract to procure insurance (Doc. 50 ¶ 60-68).

In support of its motion, Pavarini submits, *inter alia*, plaintiff's deposition testimony from December 2016 (Doc. 64, Exhibit N). Plaintiff testified, in relevant part, that the sink broke while he was leaning against it; that he was not aware of any prior complaints about the sink; and that he did not know how or why the sink fell (Doc. 64 at 42-48, 50-51, 122-123, 146, 153, 158; Exhibit N). Records from 2008 to October 15, 2014 relating to the bathroom sinks at the Standard Hotel reflect that no sink-related issues were reported in room 515 prior to the incident (Doc. 62, Exhibit L).

Todd Prol ("Prol"), the senior project manager at the Standard Hotel, who was responsible for the day-to-day construction activity on the site (Doc. 67 at 11), testified that Pavarini did not select the sinks in the hotel or have any role in creating the specifications for the bathrooms; instead, these were selected and created by the lead architect Polshek Partnership and interior designer Rw2, both of which were hired by the hotel (Doc. 67 at 13, 16). He claimed, however, that after the rooms were completed, Pavarini conducted a walkthrough of the premises to write a punch list (Doc. 67 at 20, 22).

Joseph Rosciano ("Rosciano"), the field supervisor for JES testified that the subject sink was made by a European manufacturer and was selected and approved by the architect and

engineer of the project (Doc. 68 at 15, 32-33). After the sinks were installed, they were shaken to ensure that they were not loose (Doc. 68 at 52-54). It was common practice that, if any of the sinks were loose, the bolts and nuts would be retightened and secured (Doc. 68 at 53). Rociano affirmed that JES was never called back to the Standard Hotel for any issues regarding the subject sink (Doc. 68 at 28; Exhibit R). This was corroborated by the testimony of Michael Caruso, the director of guest relations for the Standard Hotel, who affirmed, *inter alia*, that no prior complaints were made with respect to the sink in room 515 prior to plaintiff's incident (Doc. 65 at 30, 46-47, 53; Exhibit O). Lakshan Gunaratne ("Gunaratne"), the director of engineering for the Standard Hotel, who was responsible for the upkeep of the interior and exterior of the premises, including the sinks in the hotel rooms (Doc. 66 at 9-10, 12; Exhibit P), also confirmed that there were no reports of a loose sink in room 515 prior to plaintiff's injuries (Doc. 66 at 65, 89, 91; Exhibit P).

By letter dated October 13, 2014, plaintiff's counsel notified the Standard Hotel of this litigation and requested that all evidence relating to the incident, including the sink and the condition of the bathroom, be preserved for inspection (Doc. 55). Pavarini also submits a discovery response by the hotel owners dated August 21, 2018, in which they stated, "[t]he sink in question is no longer located in the bathroom nor is it available for inspection (Doc. 63, Exhibit M).

The hotel owners oppose only that branch of Pavarini's motion seeking dismissal of the complaint based on spoliation, arguing that they did not, as Pavarini claims, destroy the sink but, rather, that the sink was destroyed as a result of the incident in question (Doc. 109 ¶ 3). The hotel owners further represent that dismissal based on spoliation is inappropriate because evidence pertaining to the installation of the sink rests not within the broken sink pieces but, rather, on the

wall-mounted carrier system located behind the sink, which remains undisturbed (Doc. 109 ¶ 5). They also submit photos of the sink in question (Doc. 110; Exhibit A).

JES opposes Pavarini's motion to the extent that it seeks summary judgment against it on its causes of action based on contractual indemnification and breach of contract for failure to procure insurance (Doc. 107). JES argues, *inter alia*, that Pavarini is not entitled to summary judgment on its contractual indemnification claim because there is no proof of any defect or complaints with respect to the sink in room 515 to suggest that JES performed its work negligently (Doc. 107 ¶ 12). Additionally, JES claims that it did not intend to indemnify Pavarini for an accident such as the one alleged by plaintiff, occurring six years after its work was completed and accepted (Doc. 107 ¶ 15). JES further represents that summary judgment on the breach of contract for failure to procure insurance is not warranted because JES did obtain insurance as required by the parties' agreement (Doc. 107 ¶ 15).

LEGAL CONCLUSIONS:

(Motion Sequence 002)

As an initial matter, this Court will treat Pavarini's motion as one for summary judgment as it is clear based on the motion papers that the parties were charting a summary judgment course (*see* CPLR 3211(c); *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]; *Wein v City of New York*, 36 NY2d 610, 620-621 [1975]; *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 255 [1st Dept 1995]). It is well-established that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]; *see* CPLR 3212 (b); *Zuckerman v City of New York*, 49

NY2d 557, 562 [1980]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (*see Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Breach of Contract

As reflected by the email dated September 17, 2008, Prol, on behalf of Pavarini, confirmed that room 515 was complete and that it was accepted by the hotel (Doc. 60). In that email, Prol also expressed that Pavarini was no longer responsible for the conditions of the room (Doc. 60). Since an action for breach of a construction contract must be commenced within six years of substantial completion of the work (*see CPLR 213[2]; Mendelsohn v City of New York*, 89 AD3d 569, 569 [1st Dept 2011]; *Phillips Constr. Co. v New York*, 61 NY2d 949, 951 [1984]), Pavarini has established that the hotel owners' breach of contract claim is time-barred since it was not filed until January 2016. By failing to oppose Pavarini's substantive arguments regarding the breach of contract claim, the hotel owners have failed to raise an issue of fact so as to preclude its dismissal.

Contribution and Common-Law Indemnification

This Court rejects Pavarini's arguments that the hotel owners' indemnification claims are barred by the statute of limitations. A claim for contractual or common law indemnity is subject

to a six-year statute of limitations (*see* CPLR 213 [2]; *McDermott v City of New York*, 50 NY2d 211, 217 [1980]), and accrues when a judgment is entered or payment is made (*see Bay Ridge Air Rights Inc. v State*, 44 NY2d 49 [1978]; *see Vidal v Claremont 99 Wall, LLC*, 124 AD3d 767 [2d Dept 2015]; *Travelers Indem. Co. v LLJV Dev. Corp.*, 227 AD2d 151, 154 [1st Dept 1996]). However, this Court agrees that said claims must be dismissed on other grounds.

"To establish [a claim for] common-law indemnification, defendants must prove not only that they were not negligent, but also that the proposed indemnitor was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury" (*87 Chambers LLC v 77 Reade, LLC*, 2013 NY Slip Op 31772[U], 2013 NY Misc LEXIS 3417 *32-33 [Sup Ct, NY County 2013] [internal quotation marks, ellipsis and citations omitted]; *see Adams v Boston Props. LP*, 2009 NY Slip Op 30534[U], 2009 NY Misc LEXIS 3695 *29 [Sup Ct, NY County 2009], *quoting Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Moreover, "[c]ommon-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" (*Board. of Mgrs. of 125 N. 10th Condominium v 125North10, LLC*, 150 AD3d 1063, 1064 [2d Dept 2017] [internal quotation marks and citation omitted]).

This Court finds that Pavarini has established its prima facie entitlement to judgment as a matter of law against the hotel owners for their claim based on common-law indemnification insofar as it has set forth unrefuted proof that it neither designed nor installed the sinks in question, and that it lacked authority to direct and control JES in the installation process. Although there is testimony that Pavarini conducted a walkthrough to inspect the room after the work was completed, this type of supervisory presence has been held insufficient to impose liability on a

general contractor (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [1st Dept 2003]). Since the hotel owners fail to raise an issue of fact as to Pavarini's negligence and its control, supervision or direction of the installation of the subject sink, that branch of its motion seeking dismissal of the common-law indemnification claim against it is granted.

Moreover, since Pavarini has established, *prima facie*, that it was not negligent, dismissal of the contribution claim must also be granted (*see Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 556-557 [2d Dept 2014]). In opposition, the hotel owners have failed to raise an issue of fact with respect to this cause of action.

Based on the foregoing, this Court finds that dismissal of JES' counterclaim against Pavarini based on the doctrine of apportionment, contribution, indemnification and breach of contract, which is premised on Pavarini's alleged negligence (Doc. 21 ¶ 22-23), must also be dismissed. JES does not oppose dismissal of the counterclaim in its papers and, thus, fails to raise an issue of fact so as to preclude its dismissal.

Contractual Indemnification

However, that branch of Pavarini's motion seeking dismissal of the hotel owners' contractual indemnification claim is denied. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Sacko v NY City Hous. Auth.*, 2019 NY Slip Op 33519[U], 2019 NY Misc LEXIS 6372, * 19 [Sup Ct, NY County 2019] [internal quotation marks and citations omitted]; *see Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018]). Pursuant to the indemnification clause in the construction contract, Pavarini was liable for "all claims . . . arising out of or resulting from the performance of

the Work . . . including . . . [bodily injury] caused in whole or in part by any negligent or any other wrongful act or omission of the [c]ontractor, any [s]ubcontractor, anyone directly or indirectly employed by any of them or anyone for whose act any of them may be liable" (Doc. 56 ¶ Article 11, § 12.3). Since this Court finds that there is an issue of fact as to whether plaintiff's injuries were caused by work performed by JES (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1096-1097 [2d Dept 2018]), Pavarini has failed to establish its entitlement to summary judgment dismissing this cause of action and, thus, that branch of the motion is denied.

This Court also denies that branch of Pavarini's motion seeking summary judgment against JES for claims based on contractual indemnification and breach of contract for failure to procure insurance. Although Pavarini asserts that "[p]laintiff's accident clearly arose out [of JES's] work under the contract," (Doc. 60 ¶ 67), it fails to submit proof to support this claim. Moreover, Pavarini's cause of action against JES for breach of contract based on failure to procure insurance is contradicted by Pavarini's own proof showing a certificate of insurance dated August 7, 2008, wherein JES is listed as the insured and Pavarini as an additional insured (Doc. 58). Therefore, since Pavarini has fails to establish its prima facie entitlement to summary judgment on these claims, that branch of the motion must be denied.

(Motion Sequence 003)

In September 2019, JES moved, pursuant to CPLR 3212, to dismiss the second third-party complaint, as well as any and all cross-claims asserted against it (Doc. 70). JES argues, *inter alia*, that Pavarini's common law negligence claims must be dismissed because "JES was the mere contractor of Pavarini and as such owed no duty to the plaintiff" (Doc. 72 at 4). Relying predominantly on Prol's deposition testimony, JES contends that it was not negligent in the

installation of the sink as evidenced by the fact that the sinks were inspected after their installation and that no complaints about the sinks were reported in the years following the hotel's completion (Doc. 72 at 7). Moreover, JES maintains that the contractual indemnification claim must also be dismissed as a matter of law because there is no evidence, beyond pure speculation, that the installation of the sink was the cause of plaintiff's injuries (Doc. 72 at 8).

In opposition to JES's motion for summary judgment, Pavarini submits the expert affidavit of Thomas L. Hannon ("Hannon"), a registered professional engineer with CED Technologies Incorporated, who specializes in mechanical engineering (Doc. 116 ¶ 1). Hannon avers that he inspected hotel room 515 on June 27, 2019 and that, based on the standards set forth in the New York City Plumbing Code, "[w]all mount sinks, of the type installed in room 515 must be able to withstand static loads of 250 pounds" (Doc. 116 ¶ 5-6). He further opined that, "[i]f a wall mount bearing less than the specified 250-pound load cracks or fails[,] it was either improperly installed or defective" (Doc. 116 ¶ 7).

Generally, a contractual obligation does not give rise to tort liability in favor of a third party (*see Eaves Brooks*, 76 NY2d 220, 226 [1990]). "However, there are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Cikoja v Diebold, Inc.*, 182 AD3d 573, 822 [2d Dept 2020] [internal quotation marks and citations omitted]; *see Medinas v MILT Holdings LLC*, 131 AD3d 121, 126 [1st Dept 2015]).

While it is undisputed that JES was provided with all the specifications for installing the sink and had no part in selecting the sink that was used at the project, JES installed the sink that ultimately caused plaintiff's injuries. Thus, this Court finds that there is at least an issue of fact as to whether JES launched a force or instrument of harm while performing its contract at the construction site (*see McDowell v Xand Holdings, LLC*, 172 AD3d 547, 547 [1st Dept]), and JES cannot establish its prima facie entitlement to the drastic remedy of summary judgment by merely pointing to gaps in Pavarini's proof (*see McCullough v One Byrant Park*, 132 AD3d 491, 492 [1st Dept 2018]; *Torres v Merrill Lynch Purch*, 95 AD3d 741, 742 [1st Dept 2012]).

The remaining arguments are either without merit or need not be addressed.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that third-party defendant/second third-party plaintiff Pavarini McGovern, LLC's motion for summary judgment seeking dismissal of the third-party complaint (motion sequence 002) is granted to the extent that the first (contribution), second (common-law indemnification) and fourth (breach of contract) causes of action asserted against it by defendants/third-party plaintiffs Standard International Management, LLC, ABG Standard Operator, LLC i/s/h/a Andre Balazs Properties, ABG Standard Operator, LLC, and AB Green Gansevoort, LLC are dismissed, and it is otherwise denied; and it is further

ORDERED that that branch of third-party defendant/second third-party plaintiff Pavarini McGovern's motion seeking dismissal of second third-party defendant J.E.S. Plumbing & Heating Corp.'s counterclaim based on the doctrines of apportionment, contribution, indemnification and breach of contract (first counterclaim) is granted; and it is further

ORDERED that second third-party defendant J.E.S. Plumbing & Heating Corp.'s motion for summary judgment (motion sequence 003) is denied in its entirety; and it is further

ORDERED that, within twenty days of the entry of this order, counsel for third-party defendant/second third-party plaintiff Pavarini McGovern, LLC shall serve a copy of this order, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre Street, Room 141 B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

ORDERED that this constitutes the decision and order of this Court.

5/27/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE